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IN THE
Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., AND
MINE RECLAMATION CORPORATION,
Petitioners,
v.
NATIONAL PARKS & CONSERVATION
ASSOCIATION ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

AMICUS CURIAE BRIEF OF COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY IN SUPPORT OF KAISER EAGLE MOUNTAIN, LLC'S AND MINE RECLAMATION, LLC'S PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF KAISER EAGLE MOUNTAIN, LLC'S AND MINE RECLAMATION, LLC'S PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the County Sanitation District No. 2 of Los Angeles County (the "Sanitation District") respectfully moves for leave to file its brief as *amicus curiae* in support of Petitioners Kaiser Eagle Mountain, Inc. and Mine Reclamation, LLC's petition for a writ of certiorari.

On November 17, 2010, nine days prior to the filing of its brief, the Sanitation District provided notice to all parties requesting consent to the filing of its *amicus curiae* brief. Counsel for the Acting Solicitor General of the U.S. Department of Justice and counsel for Respondent National Parks Conservation Association have consented to the filing of this brief. Counsel for Petitioners Kaiser Eagle Mountain, Inc. and Mine Reclamation, LLC have also consented to the filing of this brief.

As of the time of this filing, counsel for Respondents Donna Charpied, Laurence Charpied, Desert Protection Society, and Center for Community Action and Environmental Justice, has not responded.

The Sanitation District respectfully requests that its motion for leave to file an amicus *curiae brief* be granted.

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[1] Due to an inadvertent calendaring error, the Sanitation District was unable to provide respondents with the 10-day notice required by Rule 37.2(a). That failure, however, is harmless in that the Sanitation District's brief will be filed more than 30 days prior to the due date for briefs in opposition, which has been extended to December 27, 2010. Therefore, respondents will suffer no prejudice from the lack of earlier notice.

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INTEREST OF AMICUS CURIAE

County Sanitation District No. 2 of Los Angeles County (the "Sanitation District") is a public agency organized under the provisions of the County Sanitation District Act, California Health and Safety Code, §§ 4700, *et seq.* The Sanitation District serves as the administrative district for an organization of 23 county sanitation districts that jointly provide a regional system of sanitary landfills and other refuse transfer and disposal facilities that meet the solid waste management needs for approximately 5.7 million people in Los Angeles County (the "Sanitation Districts").[1]

The Sanitation Districts are special districts that are formed as agencies of the State of California for the local performance of specific governmental functions. Under the County Sanitation District Act, the Sanitation Districts construct and operate major wastewater and solid waste transfer and disposal facilities that serve the residents of the County of Los Angeles. (Cal. Health and Safety Code §4741.) The directors of the Sanitation Districts are elected officials who are the presiding officers of the governing boards of the County of Los Angeles and the approximately 78 cities located within the Sanitation Districts' boundaries, including the City of Los Angeles. (Cal. Health and Safety Code §4730.) The Sanitation Districts are a regional governmental organization providing services that are essential to public health and safety.

The Sanitation District's interest in this case is based upon its purchase of the Eagle Mountain Landfill Project (the "Project") from Mine Reclamation LLC ("Kaiser") in August, 2000 in order to provide critical waste disposal

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person or entity, other than Amicus, made a monetary contribution to its preparation

capacity to Southern California. The time needed to construct and develop the Project's rail infrastructure is very lengthy, and requires that the Project proceed without unnecessary additional delay.

This case will determine how the Sanitation Districts will be able to provide an essential public service - solid waste management - to the second-largest metropolitan area in the nation. The Project is the cornerstone of a long-term plan to provide vital solid waste disposal capacity to Southern California for the next 100 years. The Court of Appeals' decision to vacate the Bureau of Land Management's ("BLM") approval of the land exchange and Environmental Impact Study ("EIS") and to then remand the case to BLM for further, and potentially lengthy, administrative proceedings, inadequately considers this overriding public purpose and will seriously and unnecessarily delay the implementation of this critically important public project. For these reasons, the Sanitation District supports the granting of the Petitioners' petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeal's Opinion (*National Parks Conservation Association v Bureau of Land Management, et. al*, 606 F.3d 1058, 1063, hereafter "Opinion") contains an erroneous analysis of the basis for, the impacts of, and the purposes underlying the Project. In view of the financial infeasibility of the Project and the nearest competing project as private operations, the highest and best use of the land involved is not landfilling.

The Opinion illogically cites eutrophication as a potentially significant impact of a waste-by-rail landfilling project and ignores the actual discussion of this issue in the EIS by focusing on the manner in which the EIS is organized and using that organization as reason to remand for further proceedings.

Finally, the Court's discussion of the Purpose and Need Statement essentially ignores the paramount public purpose underlying the Project in order to require a remand based upon private purposes that, in view of the now-public nature of the Project, are irrelevant to the transaction at issue in this case.

ARGUMENT

I. The "Highest and Best Use" Analysis of the Court of Appeals Ignores the Financial Infeasibility of the Project and the Mesquite Regional Landfill as Private Landfills.

The Court of Appeals' holding ignores the very reason that the Project is proceeding as a publicly-owned landfill—it was not financially feasible as a private landfill project. The Court's conclusion that the property's "highest and best use" is as a landfill fails to take into account the history of development of the Project and other waste-by-rail projects in Southern California.

During the 1950s, post-war development in Southern California began to create serious air quality problems in the Los Angeles Basin. One of the measures adopted to address these problems was a ban on the use of backyard incinerators. In order to provide for the management of the resulting volumes of refuse, the Sanitation Districts were charged with the task of developing a regional system of solid waste transfer and disposal facilities within the County of Los Angeles.

The Sanitation Districts eventually developed major sanitary landfill facilities throughout Los Angeles County specifically, the Palos Verdes Landfill located on the Palos Verdes Peninsula, the Calabasas Landfill located in

unincorporated Los Angeles County near the City of Calabasas, the Scholl Canyon Landfill in the City of Glendale, the Mission Canyon Landfill located in the City of Los Angeles, the Spadra Landfill located in the City of Pomona, and the Puente Hills Landfill, located in unincorporated Los Angeles County near the City of Whittier. The Puente Hills Landfill presently is the largest landfill in the nation and receives about one- sixth of the county's waste. By the 1970s, the Sanitation Districts' landfills were accepting approximately half of the approximately 29,000 tons per day of solid waste generated within the county.

Beginning in the 1970s, some of the Sanitation Districts' landfills began to reach capacity or require permit extensions. While it was then possible to obtain extensions for existing facilities over increasing community opposition, the development of new facilities within the county was rapidly becoming politically infeasible. New facilities were proposed at Main Mission Canyon, Elsmere Canyon, and elsewhere within the county, but were rejected or blocked by local opposition after the Sanitation Districts had undertaken major planning and engineering efforts. New technologies, such as converting refuse to energy, were also proposed and rejected. With the need for long-term solid waste disposal capacity continuing to increase and the available capacity within the county continuing to decrease, the Sanitation Districts established a committee of policy makers and stakeholders in the late 1980s charged with the responsibility to explore the available options and recommend policy that would provide guidance for the long-term management of the county's waste.

The resulting recommendations were eventually embodied in the County's official solid waste management plans, which were prepared in accordance with the California Environmental Quality Act ("CEQA") and other environmental quality analyses. Those recommendations called for a transition from local urban landfills to a system

of disposal that relies on remotely-located landfills accessed by rail. This system, known as waste-by-rail, represented a major shift in the manner in which solid waste was managed within the county. As a result, private operators began to propose remote landfill projects in various locations. One of those projects was the Kaiser proposal at Eagle Mountain, which is the subject of this litigation; another was the Mesquite Regional Landfill Project in Imperial County, the site of an existing gold mine. Other projects, such as rail cycle, were also proposed

During the 1990s, it became apparent that the private operation of these sites was financially infeas[illegible]e. The infrastructure costs to develop the required rail facilities and the added costs to construct large landfills that satisfied increased regulatory requirements were too great for the private sector. As established in the record, in 1994 Kaiser's investment partner, BFI, a major private landfill operator, walked away from the Project after having invested over $45 million in its permitting and development.

At this point, the Sanitation Districts concluded that, for waste-by-rail to become a reality and to meet the future solid waste disposal needs of Southern California, public involvement was necessary. In August, 2000, the Sanitation District agreed to acquire both the Eagle Mountain Landfill and the Mesquite Regional Landfill projects Together, the two projects would provide in excess of a million tons of capacity, capacity that would address the waste disposal needs of Los Angeles County for 100 years. The purchases of both projects were contingent upon the owners delivering to the Sanitation District a fully-permitted project, free of litigation, and with clear title to the necessary federal lands [2]

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[2] Footnote 1 of the Opinion erroneously states that the Sanitation District purchased the landfill property and permits "for over $8,800 per acre." The Sanitation District's purchase was for a fully permitted project, free of litigation, for a lump sum of $41 million The purchase price was not stated, calculated, or based in any way on a "per acre" amount The Opinion's description of the purchase is analogous to saying that the Sanitation District is purchasing a car "for over $10,000 per tire "

The Mesquite Regional Landfill project was the first project to resolve its litigation contingency and was purchased by the Sanitation District. This facility, permitted at 20,000 tons per day, has the potential to provide approximately half of the long-term capacity needs for the county. The Sanitation Districts have devoted over 10 years and spent over $323 million developing the Mesquite Regional Landfill and constructing the infrastructure needed to containerize the waste and load it on rail cars for shipment to that facility. An additional $64 million will be required to complete this portion of the system.

The Sanitation Districts' largest landfill, the Puente Hills Landfill, which is permitted to receive about 13,200 tons of waste per day, is scheduled to close in 2013. Other in-county private and public landfills have limited capacity and will eventually close. As operations at these in-county facilities are concluded, the additional remote disposal capacity at Eagle Mountain will become critical, and the rail infrastructure needed to access the Eagle Mountain Landfill must be in place.

The development duration and cost of the infrastructure for the Project will be comparable to the duration and cost of developing the Mesquite Regional Landfill infrastructure. Given the long lead time necessary to develop and obtain permitting for these facilities, progress must occur now to secure the additional solid waste capacity needed for Los Angeles County.

The Court of Appeal observes that, in *Desert Citizens Against Pollution v. Bisson* (9th Cir. 2000) 231 F.3d 1172, the court used the presence of the competing landfill proposal at Eagle Mountain to establish that there was a market for land that can be used as a remote landfill, and that landfill use was, therefore, the highest and best use of the exchange lands for the Mesquite Regional Landfill. (Opinion at pp. 1067-1068) The Opinion then assumes that the reverse must

also be true, and concludes that the highest and best use of the Kaiser lands must be as a landfill because of the competing Mesquite project. (*Ibid*.)

The premise of the Court's logic is flawed. The Sanitation District purchased both projects for the costs invested by the developers in obtaining their permits, since the private operation of both projects was no longer financially feasible. No value was assigned to the lands or any other aspect of the projects. Neither project therefore had any market value and cannot be used as evidence of the existence of any actual market for such projects. Therefore, a landfill is not necessarily the highest and best use of the lands at issue.

II. "Eutrophication" is Not a Significant Environmental Impact For a Modern Waste-By-Rail Landfill Project.

The project opponents' "eutrophication" argument, which captured the attention of the Court of Appeals, is wildly exaggerated, if not entirely groundless. It is an invented concept that has no relationship or application to the actual operation of a modern sanitary landfill or the Project. No purpose would be served by remanding this case for further analysis of this issue.

The EIS describes the operation of a waste-by-rail system. This operation begins with the loading of municipal waste into sealed containers, which are then transported from the urban environment to the desert by rail. Upon arrival at the remote landfill, the containers are transferred to trucks and transported to the lined disposal area of the landfill, where they are unloaded and the waste compacted into cells by heavy equipment. Each cell is covered with soil or other approved materials at the end of each day. Normal landfill operating procedures and strict regulatory

requirements prevent the entry of vectors into the disposal area. Common sense does not support the eutrophication argument or the Court's assumption that eutrophication is a significant issue.

Not only is the eutrophication issue insignificant, but it was already fully and properly addressed in the EIS. The Department of the Interior's Board of Land Appeals ("IBLA") specifically noted that waste materials would be delivered "in sealed and locked containers" and that waste would be confined to the site by applying interim cover on a daily basis and final cover when a given area of the landfill reaches capacity. (Pet. App. "C".) The IBLA also explained that "BLM's approval of the Project is subject to ongoing monitoring." (*Id.*) It is not clear what further proceedings are necessary for the BLM to comply with the Court's ruling since it has already told the BLM how to reorganize the EIS. The Court simply remands the issue to the agency to simply reorganize its discussion – again to the substantial detriment of the 5.7 million residents of Los Angeles County.

III. The Court of Appeals' Invalidation of the Purpose and Need Analysis of the EIS Due to the Inclusion of Kaiser's Private Interests is Erroneous and Contrary to the Real Public Purpose Underlying the Project.

The Opinion notes that the Statement of Purpose and Need in the EIS for the Project states that the " . . . primary purpose of the Project is to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in California. . . ." (Opinion at p. 1063.) The Court then invalidated the Statement of Purpose and Need because it included several "Kaiser-related" secondary purposes.

Since the Sanitation District has agreed to purchase the Project for public use, the only relevant purpose is the public purpose identified as the "primary purpose." There is no reason to remand the EIS to the BLM for further evaluation of Kaiser's now-irrelevant secondary private purposes. The primary Statement of Purpose and Need already meets the statutory requirements and is actually in accord with the Court's determination that the purpose and need must include a public dimension.

This Project has been the subject of exceptional public and regulatory scrutiny throughout the environmental review process. The public interest in p ecting the environment has been fully addressed and any potential impacts have been exhaustively addressed, analyzed, and mitigated. The public interest in obtaining appropriate valu for the federal government in the federal land exchange has been fully and fairly determined by the BLM, which will be receiving thousands of acres of environmentally-sensitive desert lands for the benefit of the public (See *Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1066 (9th Ci Alaska 1998) regarding the "considerable discretion" afforded to agency determinations). The National Park system has resolved its concerns about the Project by agreement with Kaiser. The public interest **not** appropriately considered by the Court is the paramount public interest of the Sanitation Districts, and the residents of Southern California, in securing the availability of an essential public service that is critical to the public health and safety by allowing for the transition from urban landfills to the remote disposal of waste by rail.

Although the Court was fully aware of the acquisition of the Project by the Sanitation Districts (Opinion, footnote 1, at p 1063), and the Sanitation Districts' public purposes and projects are facts of common knowledge, these critical interests were not given

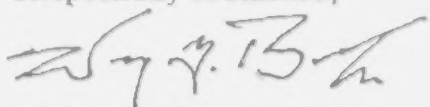
appropriate weight. The continuing litigation delays affecting the Eagle Mountain Landfill Project are highly detrimental to the public interest. No action can be taken to commence development of the materials recovery and rail-loading facilities needed to serve the Eagle Mountain Landfill Project until the acquisition is completed and the Project's disposal capacity has been secured by the public.

These interests are not adequately considered in the Court of Appeals' decision. The Court's decision to remand this matter to complete work that has already been performed or is irrelevant will materially interfere with the Sanitation District's ability to plan and provide for the long-term waste disposal needs of Southern California.

CONCLUSION

For the reasons stated above, the Petitioners' petition for certiorari should be granted.

Respectfully submitted,



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